



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA-HQ-OAR-2017-0355; FRL-10477-01-OAR]

RIN 2060-AV88

Delay of Submittal Date for State Plans Required Under the Affordable Clean Energy Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; delay of state plan submittal dates.

SUMMARY: This action extends until April 15, 2024, the deadline for state plans required to be submitted under the Clean Air Act (CAA) in accordance with the Affordable Clean Energy (ACE) rule.

DATES: This regulation is effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2017-0355. All documents in the docket are listed on the <https://www.regulations.gov/> website. Although listed, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov/>.

FOR FURTHER INFORMATION CONTACT: For questions about this document contact Mr. Nicholas Swanson, Sector Policies and Programs Division (D243-02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-4080; email address: swanson.nicholas@epa.gov.

SUPPLEMENTARY INFORMATION: The EPA is taking this final action without providing an opportunity for public comment, based on the good cause exception in section 553(b) (3) (B) of the Administrative Procedure Act (APA). The Agency has determined that seeking public comment is impracticable, unnecessary, or contrary to the public interest. The deadline for state plan submission has already passed, which necessitates an extension, and it is important that the EPA grant that extension as soon as possible to avoid confusion and uncertainty among states and regulated industry as to what their obligations are.

I. Background and Extension of Deadlines

On July 8, 2019, the EPA promulgated the Affordable Clean Energy (ACE) rule, under CAA section 111(d) (84 FR 32520, July 8, 2019). The ACE rule is an emissions guideline that directs states to develop plans that establish standards of performance for carbon dioxide (CO₂) emissions from existing coal-fired electricity generating units. The ACE rule repealed and replaced the Clean Power Plan, which the EPA had promulgated in 2015 (80 FR 64662, October 23, 2015).

Under CAA section 111(d)(1), the standards of performance in such a state plan are required to achieve an amount of emission reduction that the EPA determines can be achieved through application by the sources of what the EPA determines to be the “best system of emission reduction ... adequately demonstrated” (BSER) for reducing emissions of the pollutant in question from the sources in question. CAA section 111(a)(1). The ACE rule required states to submit plans to the EPA that establish standards of performance within three years of the date that the rule was published, that is, by July 8, 2022 (40 CFR 60.5745a).

Numerous state and municipal governments, power utilities, renewable energy trade associations, public health and environmental advocacy groups, and other parties filed petitions to review the ACE rule before the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit).

On January 19, 2021, following briefing and oral argument, the D.C. Circuit issued a decision vacating the ACE rule. *American Lung Ass'n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021). The court based the vacatur on its holding that the ACE rule's underlying legal interpretation, which was that CAA section 111(a)(1) and (d)(1) limited the BSER to control measures that can be applied at and to the source to reduce emissions at the source, is incorrect. *Id.* at 944-51. In light of this holding, the court did not find it necessary to address, and did not address, other legal and factual issues that petitioners raised concerning the ACE rule. The court issued a partial mandate concerning this part of its decision on March 5, 2021. *American Lung Ass'n v. EPA*, No. 19-1140, Order, Doc. Id. No. 1888579 (D.C. Cir. March 5, 2021).

On October 2021, the U.S. Supreme Court granted petitions for *certiorari* filed by several parties to the case, and, on June 30, 2022, issued a decision reversing the D.C. Circuit on other grounds. *West Virginia v. EPA*, 142 S.Ct. 2587 (2022). Specifically, the Court reversed the D.C. Circuit's vacatur of the ACE rule's repeal of the Clean Power Plan, holding that the Clean Power Plan was invalid under the major questions doctrine. *Id.* at 2615-16.

On October 27, 2022, the D.C. Circuit responded to the Supreme Court decision by issuing an order that, in relevant part, withdrew the above-noted mandate, thereby reinstating the ACE rule. Because the EPA had informed the court that it is presently undertaking a rulemaking process to replace the ACE rule with a new rule governing greenhouse gas emissions from existing fossil-fuel-fired power plants, the court placed the case in abeyance pending completion of that rulemaking, rather than proceed to

consider the remaining factual and legal issues raised by petitioners with respect to the ACE rule.

Thus, the ACE rule was vacated for the last 536 days of the three-year period for state plan submittal, beginning on January 19, 2021, and extending through July 8, 2022. The rule remained vacated through October 26, 2022, and then was reinstated on October 27, 2022. Because the ACE rule has been reinstated, states are once again under an obligation to submit the state plans required under the rule. However, because the rule's July 8, 2022, deadline has passed, and because states had no reason to continue to work on their plans during the period when the ACE rule was vacated, it is necessary to extend the deadline for state plan submittal.

Accordingly, in this action, the EPA is extending the date of state plan submittal by 536 days from the October 27, 2022, reinstatement of the ACE rule. Thus, the ACE rule state plans are now due on April 15, 2024. As just noted, this 536-day period is the length of time that the ACE rule was vacated from the January 19, 2021, D.C. Circuit decision in *American Lung Ass'n v. EPA* to the rule's July 8, 2022, state plan submittal due date.

The EPA is taking this final action without providing an opportunity for public comment, based on the good cause exception in section 553(b)(3)(B) of the Administrative Procedure Act (APA). The Agency has determined that seeking public comment is impracticable, unnecessary, or contrary to the public interest. The deadline for state plan submission has already passed, which necessitates an extension, and it is important that the EPA grant that extension as soon as possible to avoid confusion and uncertainty among states and regulated industry as to what their obligations are. In addition, granting the extension as soon as possible is consistent with the public's interest in timely implementation of public health and environmental protections. See generally *Wisconsin v. EPA*, 933 F.3d 303, 312-20 (D.C. Cir. 2019) (invalidating EPA rule for

granting upwind states a period of time that exceeded statutory limitations to reduce air pollutants that contribute significantly to air quality problems in downwind states).

Although the ACE rule would achieve little emission reduction (85 FR 32561 & table 3) the extended deadline provides certainty to the public as to the timeline for submittal and implementation of state plans to achieve those reductions and preserves the original, three-year period for submittal as of the date of reinstatement of the rule.

Moreover, an extension equal to the number of days from when the ACE rule was vacated to the rule's submittal date is logical and is consistent with recent actions in which the D.C. Circuit granted a compliance date extension for a rule that had been stayed or vacated for a period of time. *Michigan v. EPA*, No. 98-1497, Order, Doc. Id. No. 540209 (D.C. Cir. Aug. 30, 2000) (extending the date for sources to implement state implementation plan (SIP) revisions required under EPA's NOx SIP call rule by the number of days the D.C. Circuit had stayed the rule, so that sources will have the same number of days for developing the SIP revisions as provided in the original rule); "Rulemaking To Amend Dates in Federal Implementation Plans Addressing Interstate Transport of Ozone and Fine Particulate Matter: Interim final rule with request for comment," 79 FR 71663 (December 3, 2014) (amending the Code of Federal Regulations to correctly reflect the deadlines for sources to comply with the Cross-State Air Pollution Rule, which deadlines were revised by the D.C. Circuit when it lifted the previous stay of the rule and, accordingly, delayed the compliance deadlines by three years).

For the same reasons, the EPA is also making today's action effective immediately upon publication in the *Federal Register*. Section 553(d) of the APA provides that rules generally may not take effect until 30 days after they are published in the *Federal Register*. The purpose of this APA provision is to "give affected parties a reasonable time to adjust their behavior before the final rule takes effect." *Omnipoint Corp. v. Fed. Comm'n Comm'n*, 78 F.3d 620, 630 (D.C. Cir. 1996); see also *United*

States v. Gavrilovic, 551 F.2d 1099, 1104 (8th Cir. 1977) (quoting legislative history). However, when an agency grants or recognizes an exemption or relieves a restriction, affected parties do not need a reasonable time to adjust because the effect is not adverse. Thus, APA section 553(d) allows an effective date less than 30 days after publication for any rule that “grants or recognizes an exemption or relieves a restriction” (see 5 U.S.C. 553(d)(1)). An accelerated effective date may also be appropriate for “good cause” pursuant to APA section 553(d)(3) where an agency can “balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling.” *Gavrilovic*, 551 F.2d at 1105. The EPA has determined that the state plan submittal date extension is effective upon publication because it relieves a restriction, thereby providing obligated parties with additional time to comply with the ACE rule’s requirements. There is additionally good cause for immediate implementation of these requirements to avoid confusion and uncertainty among states and regulated industry regarding the timing of their compliance obligations.

It should be noted that the EPA has initiated a rulemaking process to repeal the ACE rule and replace it with another emissions guideline under CAA section 111(d) that would direct states to develop plans that establish standards of performance for CO₂ emissions from existing coal-fired electricity generating units. The EPA expects to propose this repeal and replacement rulemaking in the spring of 2023. If finalized, states would no longer be required to submit state plans to meet the requirements of ACE rule, and instead would be required to submit state plans to meet the requirements of the replacement emissions guideline, on the schedule established by that guideline.

II. Statutory and Executive Order Reviews

Additional information about these statutes and executive orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. In this action, the EPA is extending the date of state plan submittal by the time that was lost due to the ACE rule being vacated. Any burden for information collection requests is consistent with the original ACE rule.

C. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute a “rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law....” 5 U.S.C. 601(2). The EPA is not publishing a notice of proposed rulemaking for this rule because it is invoking the APA “good cause” exemption under 5 U.S.C. 553(b).

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the

states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. In this action, the EPA is extending the date of state plan submittal by the time that was lost due to the ACE rule being vacated. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice

part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color) and low-income populations.

The EPA believes that this type of action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on people of color, low-income populations and/or Indigenous peoples. In this action, the EPA is extending the date of state plan submittal by the time that was lost due to the ACE rule being vacated.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

III. Statutory Authority

The statutory authority for this action is provided by sections 111, 301, and 302 of the CAA as amended (42 U.S.C. 7411, 7601, 7602). This action is also subject to section 553(b)(3)(B) of the APA (5 U.S.C. 553(b)(3)(B)).

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedures, Air pollution control, Reporting and recordkeeping requirements, Greenhouse gases.

Michael Regan,

Administrator.

For the reasons set forth in the preamble, 40 CFR chapter I is amended as follows:

**PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY
SOURCES**

1. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

**Subpart UUUUa—Emission Guidelines for Greenhouse Gas Emissions From
Existing Electric Utility Generating Units**

2. Revise § 60.5745a to read as follows:

§ 60.5745a What are the timing requirements for submitting my plan?

You must submit a plan with the information required under § 60.5740a by April 15, 2024.

[FR Doc. 2023-04959 Filed: 3/9/2023 8:45 am; Publication Date: 3/10/2023]